In the Supreme Court of the United States

OCTOBER TERM, 1977

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ANHEUSER-BUSCH, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, ET AL.

AMERICAN BAKERS ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1721

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

No. 76-1795

ANHEUSER-BUSCH, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, ET AL.

No. 76-1870

AMERICAN BAKERS ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

No. 77-24

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Wheat arriving in Chicago from the west is deposited in grain elevators without regard to whether it was transported by truck, rail, lake steamer, or barge. The cost to

rail carriers of transporting wheat from Chicago to the east does not vary according to the mode of transport by which such wheat reached Chicago. However, the railroads in the past have charged higher rates for transporting to the east wheat that arrived in Chicago via truck than for transporting wheat that arrived in Chicago by the other modes. Ex-rail, ex-lake, and ex-barge wheat has been accorded a through or "proportional" rate for reshipment to the east. Ex-motor wheat has been treated as having originated in Chicago and is charged a substantially higher "local" rate (Pet. App. A, p. a-3).[1]

The Chicago Board of Trade complained to the Interstate Commerce Commission that the reshipment rate on ex-motor wheat was unreasonably discriminatory. The hearing examiner found that, on the facts before him, the higher ex-motor rates were unjustifiably discriminatory under Section 2 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 2 (Pet. App. D, pp. d-25 to d-32). The Commission adopted his decision (Pet. App. C), and the court of appeals affirmed (Pet. App. A).

The decision of the court of appeals is correct and there is no reason for further review. The Commission's decision rested on the finding that rail service to the east and the costs thereof are the same "whether the wheat arrived at the mill or elevator by rail, water or truck" (Pet. App. D, p. d-30), and that the restriction against allowing proportional rates to ex-motor wheat "inhibited and damaged [the complainants] in the conduct of their businesses of buying and selling wheat and wheat products and in the

---

[1]In 1973 the proportional rate for wheat shipped from Chicago to New York was 81.5 cents per hundred weight as compared to the local rate for the same movement of 98 cents per hundred weight (Pet. App. A, pp. a-3 to a-4). "Pet. App." refers to the appendix to the petition in No. 76-1721.

shipping thereof" (*ibid.*). The Commission concluded that these facts rendered the case indistinguishable from *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, and *James McWilliams Blue Line, Inc.* v. *United States*, 100 F. Supp. 66 (S.D. N.Y.), affirmed *per curiam*, 342 U.S. 951.

In *Mechling*, the Court held that ex-barge proportional rates on wheat reshipments from Chicago to eastern points that had been fixed by the Commission at a level higher than ex-rail and ex-lake rates discriminated against barge carriers in violation both of Section 2 and of provisions of the Transportation Act of 1940 intended to preserve the inherent cost advantages of water transportation. 330 U.S. at 576-577. In *Blue Line*, the district court held unlawfully discriminatory under Section 2 rail rates on coal to New Haven, Connecticut, that were higher if the following movement was by barge rather than by rail. This Court's affirmance cited only *Mechling*.

There is no need for this Court to re-examine the Commission's determination, which has been thoroughly considered by the court of appeals. Once the Commission found that the ex-motor rate was unjustifiably discriminatory, it was required by Section 2 to order its elimination from petitioners' tariffs. In light of the Commission's findings, as the court of appeals observed (Pet. App. A, p. a-10), "[p]etitioners' argument that the truck-rail transportation of grain is a local movement whereas the rail-barge, lake-rail movement is a through movement is beside the point."[2]

---

[2]Petitioners' claim that elimination of the discrimination will disrupt existing rate structures is similarly beside the point. Since the discrimination is unjustifiable, the rate structures resting upon that discrimination are unlawful. Cf. *American Trucking Associations, Inc.* v. *Atchinson, T & S.F. Ry. Co.*, 387 U.S. 397.

Petitioners, contending that *Mechling* applies only to ex-barge traffic and rests solely upon the 1940 Act's special protections for water traffic, rely upon this Court's earlier decision in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671. In that case, the Court sustained the Commission's discretionary determination that rail tariffs denying ex-barge traffic proportional rates upon reshipment were not unreasonable absent proof that the discrimination against such traffic was unjustifiable. The Court did not hold, however, that the Commission is required to allow rail rates to vary according to the mode of transportation used to move the goods to their rail shipping point where, as here, those rates are found to be unjustifiably discriminatory. In *Inland Waterways* the Court expressly noted that the Commission had done no more than reject the claim that imposition of local rates on ex-barge reshipments was *per se* unreasonable; the question whether such rates were unduly prejudicial or otherwise in violation of the Act was reserved for a later proceeding. 319 U.S. at 685-687. See also *Interstate Commerce Commission* v. *Mechling, supra*, 330 U.S. at 572. Moreover, in *Inland Waterways* the Commission did not consider whether the ex-barge shipments were from the same ultimate origins as the ex-rail shipments (319 U.S. at 683-686), whereas here the order complained of is limited to failure to maintain "like rates and charges, at the same levels, and *from and to the same points* * * * where the prior movement to Chicago is by for-hire motor carrier" (emphasis supplied) (Pet. App. D, p. d-31). Thus the Commission's decision in this case is not inconsistent with *Inland Waterways*.

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1977.

DOJ-1977-09